Supreme Court, U.S.
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No. 09-466

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

LEON WILLIAMS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

18 U.S.C. § 924(c) specifies mandatory consecutive sentences for certain firearm offenses, "[e]xcept to the extent that a greater minimum sentence is otherwise provided under this subsection, or by *any* other provision of law" (emphasis added). Respondent was subject to a ten-year mandatory-minimum sentence for a drug-trafficking conviction under 21 U.S.C. §§ 841(a) & 841(b)(1)(A), as well as a five-year mandatory-minimum consecutive sentence for a § 924(c) violation unless the "except" clause applied. The Second Circuit held that because the § 924(c) charge "arose from the same criminal transaction as the drug trafficking offense," the "except" clause left the sentencing judge discretion in deciding whether to impose a sentence over and above the greater ten-year mandatory minimum. Pet. App. 10a, 19a-20a. The question presented is:

Must a sentencing judge impose a mandatory consecutive sentence under 18 U.S.C. § 924(c) if the defendant is also subject to a greater mandatory-minimum sentence under another provision of law for a drug-trafficking offense that arises from the same criminal transaction as the firearm offense?

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REASONS FOR DENYING THE PETITION

This Court has repeatedly held that 18 U.S.C. § 924(c) should be interpreted literally. Specifically, in interpreting the then-current version of § 924(c), this Court read the statute's words literally and broadly. *United States v. Gonzales*, 520 U.S. 1, 6 (1997). *Gonzales* read the word "any" in the statute as a "straightforward statutory command [that left open] no reason to resort to legislative history." *Id.* Likewise, in *Busic*, this Court hewed to the then-current text of § 924(c), refusing to rewrite it to avoid supposedly unintended or irrational results. *Busic v. United States*, 446 U.S. 398, 405 (1980).

In accord with *Gonzales*'s reasoning, the Second Circuit's decision below interpreted the words "any other provision of law" in the current version of the statute. Like *Gonzales*, it read "any" literally and broadly, holding "that the mandatory minimum sentence under Section 924(c)(1)(A) is . . . inapplicable where the defendant is subject to a longer mandatory sentence for a drug trafficking offense that is part of the same criminal transaction or set of operative facts as the firearm offense." Pet. App. 2a. Like *Gonzales*, the Second Circuit rejected the government's invitation to use legislative history to cloud the clear statute. *Id.* at 13a-14a. And like *Busic*, it rejected the government's request to rewrite the statute to avoid supposedly irrational or unintended results. *Id.* at 15a-17a. In other words,

§ 924(c)(1)(A)'s "except" clause "means what it literally says." *Id.* at 5a (internal quotation marks omitted). In seeking review of that holding, the government disregards *Gonzales*'s and *Busic*'s respect for the statute's text.

In short, the Second Circuit faithfully followed and applied this Court's approach in *Gonzales* and *Busic*. While a circuit split exists, it is undeveloped, immature, lopsided, and will present other vehicles for review. Thus, this Court should deny the petition for certiorari.

I. The Decision Below Is Correct

A. The Second Circuit Correctly Applied the Statute's Plain Meaning in Accordance with This Court's Precedents

1. The Second Circuit properly interpreted the plain meaning of the statute in holding that the otherwise-applicable mandatory-minimum sentence of § 924(c)(1)(A) did not apply to respondent Leon Williams.

Section 924(c)(1)(A) provides in full:

> *Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law*, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm,

> shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years

18 U.S.C. § 924(c)(1)(A) (emphasis added).

The question presented is how to interpret the phrase "any other provision of law." The government asks this Court to look beyond the plain language of the second half of the "except" clause. Mr. Williams was convicted of three offenses: "(1) possessing a firearm after being convicted of a felony, in violation of 18 U.S.C. § 922(g); (2) possessing with intent to distribute over 50 grams of crack cocaine, in violation of 21 U.S.C. §§ 812, 841(a) & 841(b)(1)(A); and (3) possessing a firearm in furtherance of the drug trafficking crime charged in count two, in violation of 18 U.S.C. § 924(c)(1)(A)(i)." Pet. App. 3a.

As the Second Circuit reasoned, "any other provision of law" naturally includes any crime "arising from the same criminal transaction or operative set of facts" as the § 924(c) charge. *Id.* at 10a. Because "the drug trafficking conviction carried a mandatory minimum penalty of ten years under 21 U.S.C. § 841(b)(1)(A)," the Second Circuit held that the conviction triggered the "except" clause.

Id. at 3a, 8a-9a. Thus, § 924(c)(1)(A)(i) did not mandate an additional consecutive five-year sentence for Mr. Williams. *Id.* at 8a-9a

The government, however, rejects this plain reading of the text. It asks this Court to look beyond the statute's plain language because the word "any" in "any other provision of law" cannot bear its natural, normal meaning. Instead, the government argues, the "understood referent" of the phrase "any other provision of law" is "set forth in the language that immediately follows: using, carrying, or possessing a firearm in connection with a crime of violence or a drug trafficking crime." Pet. 10. In other words, "any other provision of law" is limited to future statutes that would penalize the conduct described after the comma in § 924(c): "us[ing] or carr[ying or possessing] a firearm" "during and in relation to any crime of violence or drug trafficking crime." *Id.* at 12. In support of this argument, the government cites the statute's enactment history and "obvious purpose," offering no citation for that "obvious purpose." *Id.* at 14-15.

The government's argument, however, misses the force of the statute's command by making the second half of the "except" clause effectively meaningless. The "except" clause has two parts, one of which is triggered where there is "a greater minimum sentence . . . provided by this subsection [§ 924(c)(1)(A)]," and the other where that minimum sentence is provided "by any other provision of law." The

government's reading is the plain and natural reading of the first half of the "except" clause but renders the second half of the clause redundant of the first half. In order to avoid the redundancy, the government is forced to hypothesize that, at some point in the future, Congress might enact a criminal statute that would not be codified within § 924(c) but would nevertheless specify higher mandatory-minimum sentences for the precise crime already codified within § 924(c). Pet. 12. The government cannot point to a single criminal statute that fits within its reading of the second half of the "except" clause. By effectively reading the second phrase out of the "except" clause, the government fails to make every word in the statute count. As this Court has noted, "[i]n construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

The government's reading, in short, renders the second half of the clause entirely redundant of the first half, requires hypothesizing possible future statutes that would render the phrase meaningless, and ignores the broad sweep of "any other provision of law." Because the statutory language is clear, it controls.

2. The government further objects that the Second Circuit's reading of the "except" clause nullifies 18 U.S.C. § 924(c)(1)(D), which provides that, "[n]otwithstanding any other provision of law . . . (ii) no

term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment for" the predicate violent or drug-trafficking crime. Pet. 15. But that subsection forbids only imposing another concurrent term of imprisonment. When the "except" clause applies, the sentencing court need not impose any separate term of imprisonment at all for the § 924(c) conviction. Pet. App. 11a-12a. The sentencing judge can thus easily comply with both the "except" and "notwithstanding" clauses. And when there is no higher mandatory-minimum sentence to trigger the "except" clause, the "notwithstanding" clause ensures that the § 924(c) sentence runs consecutively.

3. This Court has previously interpreted the word "any" in § 924(c) according to its plain, broad meaning. In *Gonzales*, this Court construed a previous version of § 924(c), which at the time provided:

> Whoever, during and in relation to any . . . drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years . . . . Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment* including that imposed for the . . . drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c) (1996) (emphasis added); *Gonzales*, 520 U.S. at 5. The question in *Gonzales* was whether a district court had discretion to order that a sentence under § 924(c) run concurrently with a sentence imposed by a state court. *Id.* at 2. In its analysis, however, this Court viewed the question presented as simply "whether the phrase 'any other term of imprisonment' means what it says, or whether it should be limited to some subset of prison sentences—namely, only federal sentences." *Id.* at 5 (second set of internal quotation marks and citation omitted).

Answering its own question, this Court held: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* (quoting *Webster's Third New International Dictionary* 97 (1976)). *Gonzales* underscored the importance of following the statute's plain meaning: "'[W]here there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of the words . . . .'" *Id.* at 8 (quoting *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.)). Based on a common-sense understanding of "any," this Court concluded: "There is no basis in the text for limiting § 924(c) to federal sentences." *Id.* at 5. "Any" means "any."

The reasoning of *Gonzales* applies with equal force here. The Second Circuit, in the precedent on which the decision below rested, took to heart *Gonzales*'s instruction to read § 924(c) literally according to its plain meaning. *United States v. Whitley*, 529 F.3d 150, 156, *reh'g denied*, 540 F.3d 87 (2d Cir. 2008) (citing and following *Gonzales*). "Any" "should [not] be limited to some subset of" other crimes, *Gonzales*, 520 U.S. at 5, namely other crimes penalizing the precise conduct already penalized by the remainder of the subsection. "[T]he 'except' clause . . . means what it literally says," so § 924(c) does not mandate a consecutive penalty when *any* other crime specifies a higher mandatory minimum. *Whitley*, 529 F.3d at 153. (The government did not seek certiorari to review *Whitley*'s holding.) Since the Second Circuit properly construed the term "any" within the meaning of § 924(c), this Court need not intervene to do the same.

4. Similarly, this Court in *Busic* refused to rewrite § 924(c) to effectuate Congress's supposed intent or avoid supposed absurdities. In *Busic*, the government argued that prosecutors should be able to choose between seeking a § 924(c) firearm sentence or a separate firearm enhancement built into certain predicate felony statutes. 446 U.S. at 403. The government claimed that if Congress had focused on the question, it would have wanted to give prosecutors the option of charging either § 924(c) or the enhancement built into the predicate

felony. *Id.* at 404. It also argued that a contrary ruling would lead to irrational results. *Id.* This Court rejected these claims: "[T]o the extent that cases can be hypothesized in which this holding may support curious or seemingly unreasonable comparative sentences, . . . the asserted unreasonableness flows not from . . . this decision, but rather from the statutes as Congress wrote them. If corrective action is needed, it is the Congress that must provide it." *Id.* at 405.

B. The Second Circuit's Decision Is Reasonable and Accords with the Rule of Lenity

The government's primary argument against the statute's plain meaning is that the Second Circuit's reasoning would supposedly lead to absurd results. It contends, without citation, that Congress added the "except" clause as part of amendments designed "both to broaden Section 924(c) . . . and to stiffen the penalties." Pet. 14. (In the Second Circuit, the government relied on legislative history to establish the statute's supposed purpose, Pet. App. 13a-14a, even though *Gonzales* had rejected using legislative history to muddy § 924(c)'s clear text, 520 U.S. at 6.) The Second Circuit's reasoning, it suggests, is perverse because it "*eliminat[es]* the Section 924(c) penalties altogether" for the most serious crimes, turning it into a presumptive enhancement that can be displaced by larger enhancements. Pet. 15-16. Finally, the

government offers a hypothetical scenario in which one defendant who faces a ten-year minimum drug sentence would avoid a minimum § 924(c) sentence, while a defendant convicted of possessing a smaller quantity of drugs might face five years for the drug crime plus another seven years for brandishing the gun. *Id.* at 16-17.

The government's argument fails for three reasons. *First*, the "except" clause governs only minimums, not maximums; it prevents excessive floors but leaves in place high ceilings. Even where the "except" clause applies, district courts retain discretion to impose additional prison terms where appropriate, up to § 924(c)'s maximum of life imprisonment. The decision below rejected the anomalies raised by the government, recognizing that any apparent "anomaly disappears upon close scrutiny because 'no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum. That defendant would face a maximum sentence of life . . . .'" Pet. App. 16a (quoting *Whitley*, 529 F.3d at 155). "If the 'except' clause subjected more serious drug offenders to a lower *maximum* sentence than less serious drug offenders, the Government's anomaly argument would have some force." *Whitley*, 529 F.3d at 155. Sentencing judges continue to have discretion to raise sentences to calibrate them to blameworthiness and dangerousness, subject to a floor established by § 924(c). It is entirely rational to read § 924(c) as creating a floor of at

least five, seven, or ten years imprisonment but not requiring stacking of one mandatory-minimum sentence on top of a second, higher one. *Id.* (describing Congress's "reasoned judgment" on this point as "eminently sound"). It thus leaves sentencing judges some discretion instead of requiring them to raise double-digit sentences still further.

Second, the U.S. Sentencing Guidelines also resolve the government's supposed anomaly. They go beyond mandatory minimums to calibrate sentences and prevent supposed absurdities. The Guidelines for drug-trafficking crimes require a two-level increase in the base offense level for possession of a firearm. *See* U.S. Sentencing Guidelines Manual § 2D1.1(b)(1) (2007). In the government's example, the more-serious defendant who possessed at least five kilograms of cocaine would face a base offense level of 32, plus the two-level firearm enhancement. *See id.* § 2D1.1(b)(1), (c) (2007). Put more precisely, the Guidelines specify a sentencing range of 151 to 188 months for a defendant with no criminal history. The low end of the range, 12 years and 7 months, exceeds the mandatory-minimum sentence applicable to the less-serious offender hypothesized by the government. Thus, if the government is concerned that the defendant convicted of possessing a greater amount of narcotics will receive a lesser sentence, that concern is illusory. The Sentencing

Guidelines would give the court ample authority to impose a greater sentence for the defendant who committed the graver crime.[1]

Finally, if there were any question whether the "except" clause included predicate narcotics offenses, the rule of lenity rather than the absurdity canon would answer it. Even if it is ambiguous whether Congress intended to preclude consecutive minimum sentences, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (internal quotation marks omitted); *accord Busic*, 446 U.S at 407.

II. The Circuit Split Is Immature, Lopsided, and Poorly Developed

1. Although there is a circuit split on this issue, it does not warrant this Court's review. First, the government exaggerates its depth. For example, while the government cites *United States v. Jolivette*, 257 F.3d 581 (6th Cir. 2001), that case addressed the "except" clause only in dicta: the case did not involve crimes that otherwise

[1] While the Sentencing Guidelines are now advisory, sentences remain subject to appellate review for reasonableness, and the Guidelines remain useful benchmarks to reduce unwarranted disparities of the sort the government fears. *See United States v. Booker*, 543 U.S. 220, 245 (2005) (remedial majority opinion); *Gall v. United States*, 522 U.S. 38, 45-50 (2007).

included mandatory-minimum sentences. *Id.* at 587 ("Neither subsection (a) nor subsection (d) of § 2113 contains a minimum sentence . . . .").

2. The remaining split is immature, so this Court should deny review to allow time for further and fuller development in the lower courts. Most of the circuits that have construed the "except" clause have done so only fleetingly or recently. In *London*, for example the Fifth Circuit construed the "except" clause in a passing paragraph, referring to an unpublished, non-precedential decision. *United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009) (citing *United States v. Collins*, 205 Fed. App'x 196 (5th Cir. 2006)); 5th Cir. R. 47.5.4.

Moreover, none of the cases cited by the government was reheard *en banc*, and none grounded its analysis in *Gonzales* or *Busic*. Instead, the circuits either simply follow other cases on the same side of the split, *see, e.g.*, *United States v. Studifin*, 240 F.3d 415, 422-23 (4th Cir. 2001) (discussing *United States v. Alaniz*, 235 F.3d 386, 386-90 (8th Cir. 2000), *cert. denied*, 533 U.S. 911 (2001)); *United States v. Segarra*, 582 F.3d 1269, 1272-73 (11th Cir. 2009), or cite the legislative history to avoid the section's plain language. *See, e.g.*, *Alaniz*, 235 F.3d at 386-90. The circuits may still resolve this young conflict by reconsidering their precedents *en banc* in light of the Second Circuit's reliance on *Gonzales*.

The Second Circuit is the only circuit to have considered how *Gonzales*'s analysis should inform the reading of § 924(c)'s "except" clause and its use of the word "any." The Second Circuit did so in *Whitley*, 529 F.3d at 156, a decision the government concedes is the intellectual precursor to this case. *See* Pet. 4-7. Because *Gonzales* is this Court's closest authority and only the Second Circuit has considered its guidance, this Court should await further decisions from other circuits that directly address *Gonzales*'s relevance to the "except" clause.

Most of the cases that make up the split are quite recent. Four of the six cases on which the government relies to demonstrate a split are 2009 cases. *See, e.g.*, *Segarra*, 582 F.3d at 1272; *London*, 568 F.3d at 564; *United States v. Pulido*, 566 F.3d 52, 65 & n.6 (1st Cir. 2009); *United States v. Easter*, 553 F.3d 519, 525 (7th Cir. 2009) (per curiam). Even the Second Circuit's analysis is relatively new. The Second Circuit denied rehearing in this case only this past June, *see* Pet. 1, and denied rehearing in *Whitley* only in August of last year, *Whitley*, 540 F.3d at 87. This Court should await further percolation before intervening.

3. As the government concedes, the circuit split it identifies is lopsided. *See* Pet. 18. This Court should await fuller development of

the split and a wider range of reasoned decisions to inform its consideration of the issue.

4. Finally, this Court should wait to review a future case because this case is interlocutory, as the Second Circuit remanded it for resentencing. On remand, the district court will have discretion to impose a sentence below fifteen years or not. Pet. App. 19a-20a. It is too early to predict whether Mr. Williams will ultimately receive a lower sentence than the government's construction of § 924(c) would allow.

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to deny the government's petition for certiorari.

Respectfully submitted,[a]

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